(1)

91-659

Supreme Court, U.S.
FILED
SEP 8 1991
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

Fall Term, 1991

No. _____

ROBERT FARMIGONI, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

FRANK G. DeSALVO
725 Girod Street
New Orleans, LA 70130
La. Bar # 4898

Counsel for Petitioner

QUESTIONS PRESENTED

I.

Whether the Mississippi Trial Court erred in denying defendants motion to dismiss the Mississippi indictment on the grounds of Double Jeopardy.

II.

Whether the Mississippi Trial Court erred in making the Mississippi sentence run consecutively with the Louisiana sentence.

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2. The decision below by the Court of Appeals conflicts with a recent decision of this Court as to the imposition of consecutive sentences as to two Indictments based on the same substantive offense.

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TABLE OF AUTHORITIES

CASES

Grady vs. Corbin, 495 U.S. Cases 110 S. Ct. 2084, 109 L.Ed. 2d 548 (1990).

STATUTES

1. United States Const. Amend. 5. (West 1987)

2. United States Code Annotated 18 U.S.C.A. §1344 (West Supp. 1991)

OPINION BELOW

The opinion of the Court of appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of Mississippi.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 7, 1991. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION AMENDMENT 5

"[N]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. Amendment V (West Supp. 1987)

§1344 BANK FRAUD

Whoever knowingly executes, or attempts to execute, a scheme or artifice–

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;

shall be fined not more than $1,000,000 or imprisoned not more than 20 years or both. United States Code Annotated 18 U.S.C. A§1344 (West Supp. 1991).

STATEMENT OF THE CASE

On February 21, 1990, Robert Farmigoni in the United States District Court for the Eastern District of Louisiana, before the Honorable Judge Marcel Livaudais, Jr., entered a plea of Nolo Contendere to a second superceding indictment which charged him with violations of Title 18 U.S.C. 1344, Title 18 U.S.C. 215 and Title 18 U.S.C. 2 [Criminal Docket 88-370 "E" (5)]. Count IX of this indictment alleges that as part of the execution of a scheme to defraud, Robert Farmigoni provided a Letter of Credit and Commitment Letter for the benefit of Loretta Lustig: Letter of credit number 1821, for the benefit of Double Development, Inc., dated 6/2/86, for the amount of $550,000.00, in violation of Title 18 U.S.C. 1344.

On April 19, 1988 in U.S. District Court for the Southern District of Mississippi, Jackson Division, the Grand Jury returned an indictment that alleged violations of Section 2 and Section 1344, Title 18, United States Code. Court 2 of that indictment alleges that on or about June 2, 1986, Robert F. Farmigoni issued a fraudulent letter of credit No. 1821 to Trustmark National Bank in the amount of $550,000.00, for the account of Double Development, Inc., [Criminal No. J88-00031(W)].

Robert Farmigoni moved the District Court to dismiss the second indictment on grounds of double jeopardy. Subsequently, the Court denied Farmigoni's motion, on April 6, 1990, and informed Farmigoni's counsel to be ready for trial on Monday, April 9, 1990.

DISTRICT OF MISSISSIPPI, JACKSON DIVISION, DENYING PETITIONER'S MOTION TO DISMISS THE INDICTMENT FOR REASONS OF DOUBLE JEOPARDY, AND REQUESTING AN ORDER STAYING THE CRIMINAL TRIAL OF PETITIONER IN SAID DISTRICT COURT, CRIMINAL NO. J88-00031(W). This was docketed number 90-1253 and filed on April 6, 1990. On the same day the Petition was denied by the United States Fifth Circuit Court of Appeals.

On April 9, 1990, defendant Farmigoni pled guilty to Count 2 of the Mississippi indictment alleging a violation of 18 U.S.C. §1344 relative to Bank Fraud and 18 U.S.C. §2, relative to Aiding and Abetting.

On June 14, 1990, he was sentenced by United States District Judge for the Southern District of Mississippi, Henry T. Wingate, to three and one half years in prison. The sentence was to run consecutively with the term of imprisonment in the Eastern District of Louisiana case, Criminal No. 88-370 (E5).

The Court recommended that Farmigoni be imprisoned in a facility capable of addressing his medical needs.

On June 20, 1990, defendant filed a Motion for Appeal, appealing the Double Jeopardy issue and the consecutive sentencing. This appeal was taken pursuant to U.S.C. Section 1291 which states that: "The Court of Appeals shall have jurisdiction of appeals from all final decisions of the District Courts of the United States." On June

7, 1991, the United States Fifth Circuit Court of Appeals issued a decision affirming the District Court's decision. Farmigoni now timely files this writ of certiorari to this Court.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW BY THE COURT OF APPEALS CONFLICTS WITH A RECENT DECISION OF THIS COURT AS TO THE IMPOSITION AND INTERPRETATION OF THE DOUBLE JEOPARDY CLAUSE.

The Double Jeopardy Clause States: "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb." United States Constitution Amendment 5.

In the present case defendant has been indicted in both the U.S. District Court for the Southern District of Mississippi and in the U.S. District Court for the Eastern District of Louisiana.

In the present case the offenses are the same because both indictments allege the same offense (Bank Fraud) committed by the same individuals (Robert Farmigoni and Loretta Lustig) by the use of the same letter of credit (1821) issued on the same date (June 2, 1986), issued for the benefit of the same entity (Double Development, Inc.), for the same amount ($550,000.00). Moreover, in the description of the scheme to defraud as outlined in the Louisiana indictment, it is specifically alleged that "[i]t was a further part of the scheme to defraud that LORETTA LUSTIG used the Letters of Credit and Commitment Letter to obtain funds from other financial institutions."

This is an obvious reference to the allegations also made in the Mississippi indictment.

The time periods in the Mississippi indictment "On or about June 4, 1986 and prior thereto") is included in the Louisiana indictment ("Beginning in or about March 1985 and continuing until in or about June 1986...").

The places where the offenses are alleged to have occurred according to the Louisiana indictment ("the Eastern District of Louisiana and elsewhere") would, of course, include Mississippi.

In sum, the charge in Count IX of the second superceding indictment in the U.S. District Court in Louisiana is identical to the charge in Count 2 of the indictment in the U.S. District Court in Mississippi.

In the present case, the same statutory violations are charged in both the Mississippi and the Louisiana indictment.

The elements of the two violations charged are the same in both cases. Both indictments arose out of the same factual situations, i.e., the issuance of false Letter of Credit 1821 by defendant Robert Farmigoni. The substantive crime occurred through the issuance of the false letter of credit for fraudulent purposes irregardless of what bank was the victim.

Thus, when Robert Farmigoni pled nolo contendere to the Louisiana indictment for issuing a false Letter of Credit, No. 1821, for the benefit of Loretta Lustig to use to fraudulently obtain funds from

other financial institutions, the substantive crime was complete.

Naming a specific bank in the Mississippi indictment, i.e., the Trustmark National Bank, was not a fact which made the two indictments different for double jeopardy purposes.

The crime was in the issuance of the false letter of credit and the scheme to defraud a federally insured bank.

This issue as to whether or not Farmigoni violated the bank fraud statute was determined when he pled nolo contendere to the Louisiana indictment. This was a final determination of the issue and resulted in a conviction of Farmigoni.

The Fifth Circuit Court of Appeals agreed with the Governments contention that: "Farmigoni violated the same statute on two separate occasions, in two different ways, involving two different victims, two separate offenses." They further held that a "single transaction, especially if, as here, of an extended sort, can produce numerous infractions." They further held that "an indentifiable (and identified) defrauded bank is elemental to a violation of § 1344."

Since the Louisiana indictment did not name a specific bank that Farmigoni is alleged to have defrauded, they felt that "The Louisiana indictment sets forth a separate and independent violation from the Mississippi indictment." (Appendix, opinion Fifth Circuit Court of Appeals, June 7, 1991).

The reasoning of the Fifth Circuit, however, is in direct conflict with this Court's recent decision in Grady v. Corbin, 494 U.S.

_____, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990).

In Grady, this Honorable Court held that" "[D]ouble jeopardy bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which defendant has already been prosecuted. This is not an "actual evidence" or "same evidence" test. The critical inquiry is what conduct the State will prove, not the evidence the State will use to prove the conduct;" Id. at 2093.

In the case at bar, the Fifth Circuit, did not follow this test. The State in both Louisiana and Mississippi attempted to prove the same conduct on the part of Farmigoni – the issuance of the false letter of credit no. 1821 for the benefit of Double Development, Inc. Both Mississippi and Louisiana attempted to prove that this was done with the intent to defraud a bank as defined in the bank fraud statute. 18 U.S.C. § 1344.

Under the Grady test, the Mississippi indictment cannot survive. The indictment charges an offense for which Farmigoni was already convicted in Louisiana.

The Fifth Circuit erred in upholding the Mississippi trial court and that decision should be reversed.

2. THE DECISION BELOW BY THE COURT OF APPEALS CONFLICTS WITH A RECENT DECISION OF THIS COURT AS TO THE IMPOSITION OF CONSECUTIVE SENTENCES AS TO TWO INDICTMENT BASED ON THE SAME SUBSTANTIVE OFFENSE.

Farmigoni submits to this Court that the Fifth Circuit erred in upholding the trial court as to the imposition of consecutive sentences on two separate charges arising out of the same transaction. Both the Mississippi and the Louisiana convictions were for violations of the same statute. To impose consecutive rather than concurrent sentences under these circumstances resulted in an unconstitutionally harsh sentence of defendant Farmigoni.

In essence Farmigoni has been convicted and sentenced twice for the same crime.

In the first part of his appeal defendant Farmigoni contends that for double jeopardy purposes that the Mississippi and the Louisiana indictments allege the same offense.

For sentencing purposes, defendant submits they are also the same.

Both the Mississippi and the Louisiana convictions are based on two acts of bank fraud caused by the issuance of a false Letter of Credit, that is, Letter of Credit #1821. In both cases the Letter of

Credit was used for the benefit of Double Development, Inc., a company owned by Loretta Lustig.

Thus, the offense in which Farmigoni pled guilty to, bank fraud, in both Mississippi and Louisiana, was based on a single transaction. The underlying facts causing the statutory violation in both indictments was the same.

Under the reasoning in Grady, supra, the Fifth Circuit erred when it held that "[H]e committed two separate violations of a single statute, involving distinct acts and independent intent to defraud two discrete financial institutions." (See page 39 of the Appendix hereto).

Thus, where as here, the evidence relied upon to support a guilty plea in both cases is the result of a single act or transaction, consecutive sentences are inappropriate.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted:

Frank G. DeSalvo

FRANK G. DeSALVO
Attorney for Petitioner
725 Girod Street
New Orleans, LA 70130

(504) 524-4191

La. Bar # 4898

IN THE

SUPREME COURT OF THE UNITED STATES

Fall Term, 1991

No. _____

ROBERT FARMIGONI, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

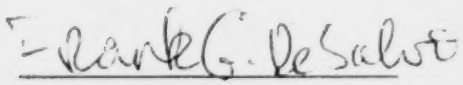
PROOF OF SERVICE

I hereby certify that on this _____ day of _____, 1991, _____ copies of the Petition for Writ of Certiorari, were mailed, postage prepaid, to George Phillips United States Attorney and Victoria May, Assistant United States Attorney, for the Southern District of Mississippi, One Jackson Place, 188 E. Capitol St., Suite

500, Jackson, Mississippi, 39201, Counsel for the Respondent, the United States of America.

I further certify that three copies of the Petition for Writ of Certiorari were mailed postage prepaid to the Solicitor General, Department of Justice, Washington, D.C. 20530, counsel for the Respondent, the United States of America, in this Court. I further certify that all parties required to be served have been served.

Respectfully submitted:



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La. Bar # 4898
Counsel for Petitioner
Robert Farmigoni

IN THE

SUPREME COURT OF THE UNITED STATES

Fall Term, 1991

No. _____

ROBERT FARMIGONI, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

APPENDIX

FRANK G. DeSALVO
725 Girod Street
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(504) 524-4191
La. Bar # 4898
Counsel for Petitioner

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 90-1253

USDC #CR J88-00031 (W)

IN RE:

ROBERT FARMIGONI,

Petitioner.

U.S. COURT OF APPEALS

FILED

APR - 6 1990

GILBERT F. GANUCHEAU

CLERK

- - - - - - -

On Petition for Writ of Mandamus and/or Prohibition and/or Certiorari to the United States District Court for the Southern District of Mississippi

- - - - - - -

Before POLITZ, GARWOOD and JOLLY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition for writ of mandamus and/or prohibition and/or certiorari of Petitioner Robert Farmigoni is DENIED.

IN THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

JACKSON DIVISION

SOUTHERN DISTRICT OF MISSISSIPPI

FILED

APR 6 1990

J.T. NOBLIN, CLERK

BY (S) S. Carter DEPUTY

UNITED STATES OF AMERICA PLAINTIFF

VS. CRIMINAL ACTION NO. J88-00031 (W)

ROBERT FARMIGONI DEFENDANT

ORDER

Having considered defendant's Motion for Leave of Court to file a Motion to Dismiss the Indictment,

IT IS HEREBY ORDERED that the Court, failing to find good cause for the motion, denies leave to the defendant to file this motion. The deadline for the filing of motions has long since expired;

the court has reviewed the contents of the proposed motion and finds the matter lacking in juridical strength. This matter set for trial on the 9th day of April, 1990, will proceed as scheduled.

SO ORDERED this the 6th day of April, 1990.

(S) Henry T. Wingate

UNITED STATES DISTRICT JUDGE

AO 245 S (3/88) Sheet 1 - Judgment Including Sentence Under the Sentencing Reform Act

UNITED STATES DISTRICT COURT

SOUTHERN District of MISSISSIPPI

JACKSON DIVISION

UNITED STATES OF AMERICA

V.

ROBERT G. FARMIGONI

(Name of Defendant)

David Holderfield (Retained)

Defendant's Attorney

JUDGMENT INCLUDING SENTENCE

UNDER THE SENTENCING REFORM ACT

Case Number J88-00031 (W)

THE DEFENDANT:

[x] pleaded guilty to count(s) 2 of the criminal indictment.

[ ] was found guilty on count(s)_____after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18 U.S.C. §1344	Bank Fraud	2
18 U.S.C. §2	Aiding and Abetting	2

The defendant is sentenced as provided in pages 2 through _____ of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)_____ and is discharged as to such count(s).

☐ Count(s) _____(is)(are) dismissed on the motion of the United States.

☐ The mandatory special assessment is included in the portion of this Judgment that imposes a fine.

☒ It is ordered that the defendant shall pay to the United States a special assessment of $50.00 , which shall be due immediately.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

425-68-1618

June 14, 1990

Date of Imposition of Sentence

Defendant's mailing address:

112 Willowbrook Drive

Gretna, LA 70056

(S) Henry T. Wingate

Signature of Judicial Officer

Defendant's residence address:

same

Henry T. Wingate
U.S. District Judge

Name & Title of Judicial Officer

21 June 1990

Date

AO 245 S (3/88) Sheet - Imprisonment

Judgment—Page 2 of 2

Defendant: Robert F. Farmigoni

Case Number: J88-00031 (W)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of three and one-half (3 1/2) years, to run consecutive to the term of imprisonment in the Eastern District of Louisiana, Criminal No. 88-370-E5 .

[x] The court makes the following recommendations to the Bureau of Prisons: that the defendant be imprisoned in a facility capable of addressing his medical needs.

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshall for this district,

[ ] at _____ a.m. p.m. on _____

[ ] as notified by the Marshall.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

[ ] before 2 p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to

_____ at

_____, with a certified

copy of this Judgment.

_____

United States Marshal

By _____

A TRUE COPY I HEREBY CERTIFY

J.T. Nebin, CLERK

By: (S) J. Evans 6/21/90

Deputy Clerk

AO 245 S (REV. 4/90) Sheet 1 - Judgment in a Criminal Case

AMENDED JAN 30 1991

UNITED STATES DISTRICT COURT

SOUTHERN District of MISSISSIPPI

JACKSON DIVISION

UNITED STATES OF AMERICA

V.

ROBERT G. FARMIGONI

((Name of Defendant)

David Holderfield (Retained)

Defendant's Attorney

JUDGMENT IN A CRIMINAL CASE

Case Number J88-00031 (W)

THE DEFENDANT:

[x] pleaded guilty to count(s) 2 of the criminal indictment .

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Accordingly, the defendant is adjudged guilty of such count(s), which involve the following offenses:

Title & Section	Nature of Offense	Count Number(s)
18 U.S.C. §1344	Bank Fraud	2
18 U.S.C. §2	Aiding and Abetting	2

The defendant is sentenced as provided in pages 2 through _____ of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)_____ and is discharged as to such count(s).

☐ Count(s) _____(is)(are) dismissed on the motion of the United States.

☒ It is ordered that the defendant shall pay to the United States a special assessment of $50.00 , for count(s) _____, which shall be due ☐ immediately ☐ as follows:

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of residence or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Defendant's Soc. Sec. Number:

425-68-1618

Defendant's Date of Birth:

10/18/36

Defendant's Mailing Address:

112 Willowbrook Drive

Gretna, LA 70056

Defendant's Residence Address:

same

June 14, 1990

Date of Imposition of Sentence

(S) Henry T. Wingate

Signature of Judicial Officer

Henry T. Wingate

U.S. District Judge

Name & Title of Judicial Officer

28 Jan. 1991

Date

AO 245 SA (Rev. 4/90) Sheet - Imprisonment

Judgment—Page 2 of 2

Defendant: Robert F. Farmigoni

Case Number: J88-00031 (W)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of three and one-half (3 1/2) years, to run consecutive to the term of imprisonment in the Eastern District of Louisiana, Criminal No. 88-370-E5 .

[x] The court makes the following recommendations to the Bureau of Prisons: that the defendant be imprisoned in a facility capable of addressing his medical needs.

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshall for this district,

[ ] at _____ a.m. p.m. on _____

[ ] as notified by the Marshall.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons

[ ] before 2 p.m. on _____.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation Office.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to

_____ at

_____, with a certified

copy of this Judgment.

_____

United States Marshal

By _____

Deputy Marshal

EXHIBIT A

UNITED STATES DISTRICT COURT FOR

EASTERN DISTRICT OF LOUISIANA

DOCKET NO. 88-370 E/5

February 21 2:22 PM 1990

UNITED STATS OF AMERICA

vs

ROBERT FARMIGONI

JUDGMENT AND PROBATION COMMITMENT ORDER

(AO 245-19/82)

In the presence of the attorney for the government the defendant

appeared in person on this date: 2/21/90

with counsel

FRANK DeSALVO

PLEA AS TO COUNTS 1 THROUGH 11

OF SECOND SUPERSEDING INDICTMENT:

NOLO CONTENDERE

FINDING & JUDGMENT: GUILTY

Defendant has been convicted as charged of the offense(s) of violation of Title 18 USC 1344, Title 18 USC 215 and Title 18 USC 2

AS CHARGED IN THE

SECOND SUPERSEDING INDICTMENT

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of three years as to Counts 1 through 10, said sentences are to run concurrently. As to Count 11, imposition of sentence is suspended, and the defendant is placed on three years probation, to begin upon release from imprisonment.

IT IS FURTHER ORDERED that the defendant pay to the Clerk, United States District Court a special assessment fee of $50.00 as to each count, for a total of $550.00.

Defendant is to report to designated institution on April 3, 1990 before 12:00 Noon.

On motion of U.S. Attorney, IT IS ORDERED that the Indictment and First Superseding Indictment are hereby DISMISSED.

In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law may issue a warrant and revoke probation for a violation occurring during the probation period.

The court orders commitment to the custody of the Attorney General and recommends.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.

FEB 22 1990

U.S. District Judge: (S) Marcel Lividauis, Jr.

February 21, 1990

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 90-1494

UNITED STATES of America

Plaintiff-Appellant

v.

Robert FARMIGONI,

Defendant-Appellant

Appeal from the United States District Court

for the Southern District of Mississippi

(June 7, 1991)

BEFORE BROWN, KING, and GARWOOD, Circuit Judges.

JOHN R. BROWN, Circuit Judge.

Robert Farmigoni challenges on double jeopardy grounds his second conviction and sentence by his guilty plea arising out of a series of fraudulent banking transactions. Farmigoni was first convicted in the Federal District Court for the Eastern District of Louisiana after entering a plea of nolo contendere to bank fraud in violation of 18 U.S.C. §§ 2, 215 and 1344. His second conviction on

a guilty plea to violation of 18 U.S.C. §§ 2 and 1344, in the District Court for the Southern District of Mississippi, is now before us on appeal. Finding that the charges arose from two separate and distinct violations o the bank fraud statutes, we affirm the conviction and sentence imposed by the Mississippi district court.

The Double Cross

Farmigoni served as a senior vice president and loan officer of First Financial Savings and Loan Association in Lutcher, Louisiana (First Financial), from March 1985 until his resignation on June 6, 1986. Throughout his tenure with First Financial, Farmigoni was involved with Loretta Lustig, a customer of the bank, in a scheme to defraud the institution by issuing unauthorized letters of credit in favor of various of Lustig's concerns. Lustig used the documents to obtain funds from other financial institutions and paid Farmigoni for his key complicity.

Shortly before his resignation from First Financial, Farmigoni signed a fraudulent letter of credit for the benefit of Double Development, Inc. (Double Development), a business owned by Lustig. The letter of credit ostensibly committed First Financial to pay Trustmark National Bank of Jackson, Mississippi (Trustmark), up to $550,000 in the event that Lustig's company defaulted on a loan. Farmigoni was not authorized to issue the letter, and First Financial had no knowledge of his actions.

A few days after the letter of credit was prepared, Lustig presented it with a loan application to Trustmark. Trustmark, relying on this bogus letter, loaned Double Development $500,000.

On April 19, 1988, Farmigoni was charged in the Eastern District of Louisiana with bank fraud and aiding and abetting for these and related activities. The grand jury by indictment and subsequent supplemental indictment (the Louisiana indictment) charged him on eleven counts, including one count that Farmigoni defrauded First Financial in violation of 18 U.S.C. § 1344.[1] Farmigoni entered a plea of nolo contendere, and the district court convicted and sentenced him on these charges in February 1990.

In April 1989, while the Louisiana case was pending, Farmigoni was indicted in the Southern District of Mississippi for defrauding Trustmark in violation of the same bank fraud statute.[2] He pleaded guilty to this charge after the trial court rejected his motion to dismiss on double jeopardy grounds. Farmigoni was subsequently convicted and sentenced to three and one-half years. The court's sentence specified that he was to serve this time consecutive to the sentence imposed in the Louisiana case.

---

[1] This provision states:

Whoever knowingly executes, or attempts to execute, a scheme or artifice —

(1) to defraud a financial institution; or

(2) to obtain any of the moneys, funds, credits, assets, securities, or other

Farmigoni claims that the Mississippi district court erred (1) in refusing to dismiss the Mississippi indictment, and (2) in ordering him to serve consecutive, rather than concurrent, sentences. Since both of these contentions rest on purely legal grounds, we employ a de novo standard of review.

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property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; shall be fined not more than $1,000,000, or imprisoned not more than 30 years, or both.

18 U.S.C. § 1344.

Count 9 of the Louisiana indictment charged Farmigoni with providing Lustig with letter of credit number 1821 for the benefit of Double Development in violation of 18 U.S.C. §§ 2 and 1344. As a preface to the specific counts, the indictment described a scheme to defraud, in which this false letter of credit played only one part. This part of the indictment generally charged Farmigoni and Lustig with "unlawfully, willfully and knowingly execut [ing] a scheme and artifice to defraud First Financial and to obtain moneys, funds, credits, assets, securities and other property owned by or under the control of First Financial by means of false and fraudulent pretenses, representations and promises."

[2]Count 2 of the Mississippi indictment charged Lustig and Farmigoni as co-defendants with applying for a loan at Trustmark on behalf of Double Development (with the fraudulent letter of credit which Farmigoni issued), in violation of 18 U.S.C. §§ 2 and 1344.

Farmigoni argues that the Fifth Amendment prohibition against subjecting a person to double jeopardy bars the government from prosecuting and convicting him under his plea of guilty to the Mississippi indictment.[3] He asserts that the offenses in the Louisiana and Mississippi cases are the same because both indictments arise out of the same scheme charging him with using letter of credit number 1821 to commit bank fraud for the benefit of Double Development.

The Supreme Court declared in Blockburger v. United States that the Double Jeopardy Clause prohibits successive prosecutions for the same criminal act or transaction under two criminal statutes unless "each provision requires proof of an additional fact which the other does not." 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L.Ed. 306 (1932). Grady v. Corbin, 495 U.S. ____, 110 S. ct. 2084, 109 L.Ed.2d 548 (1990), without a doubt markedly extended the Blockburger doctrine to bar subsequent prosecutions "in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant

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[3] In light of our decision on the merits, we do not address the matter, not even alluded to in the briefs of either party, whether the plea of guilty waived the double jeopardy claim. See Menna v. New York, 423 U.S. 61, 96 S. Ct. 241, 46 L.Ed.2d 195 (1975); United States v. Broce, 488 U.S. 563, 109 S. Ct. 757, 102 L.Ed.2d 927 (1989).

has already been prosecuted." Id. at ____, 110 S. Ct. at 2093, 109 L.Ed.2d at 564. Grady distinguished between the elements of the offense and the evidence used to prove the commission of an offense, observing that "[t]he critical inquiry is what conduct the State will prove, not the evidence the State will use to prove that conduct. . . . [T]he presentation of specific evidence in one trial does not forever prevent the government from introducing that same evidence in a subsequent proceeding." Id. (citation omitted).

Initially we point out that both Blockburger and Grady involved different offenses from different statutes arising out of the same acts or occurrence. In contrast, in the instant case the government contends that Farmigoni violated the same statute on two separate occasions, in two different ways, involving two different victims — two separate offenses.

We accept the government's position that the subsequent prosecution was valid. Farmigoni's contention that double jeopardy attaches because both indictments arose out of the same scheme ignores the fact that a single transaction, especially if, as here of an extended sort, can produce numerous infractions. See Gore v United States, 357 U.S. 386, 389, 78 S. Ct. 1280, 1283 2 L.Ed.2d 1405, 1408 (1958). The Mississippi indictment required proof that the fraudulent letter of credit was presented to Trustmark as collateral for the $500,000 loan request. The Louisiana indictment, however, required the government to show only that the fraudulent letter of credit was

issued but not authorized, for the purpose of defrauding some financial institution, and that Farmigoni's participation in its issuance constituted a scheme to defraud First Financial. The charge did not involve Trustmark, and no proof of presentment of the letter of credit was necessary for the government to convict under the Louisiana indictment.

Second, as the trial court explained, the bank fraud statute requires proof of two basic elements: (1) the defendant executed or attempted to execute a scheme or artifice to defraud or to obtain money or funds from a financial institution by false or fraudulent pretenses; and (2) the defendant knowingly and willfully committed the action or actions necessary to perpetrate that fraud. The Louisiana indictment, therefore, required that the government prove that Farmigoni knowingly and willfully intended to defraud First Financial. The Mississippi indictment charged that Farmigoni knowingly and willfully intended to defraud Trustmark. Although both indictments arose out of the same initial scheme, neither requires proof of intent to defraud the other unnamed financial institution.

Farmigoni further argues that, because the Louisiana indictment generally described the underlying scheme as one to defraud First Financial and "other financial institutions," his guilty plea under that indictment applied to the charges of fraud against both First Financial and Trustmark. The Louisiana indictment viewed as a whole does not provide adequate basis for Farmigoni's contention.

The specific counts under which Farmigoni was convicted did not refer by name to any financial institution other than First Financial. When the indictment is read within the context of the clearly singular wording of the statute, which makes it a crime to defraud a financial institution, see 18 U.S.C. § 1344, First Financial emerges as the victim of the fraud. Indeed, an identifiable (and identified) defrauded bank is elemental to a violation of § 1344. The names of no other institutions either appear in the Louisiana indictment or are required for conviction under the bank fraud statute. Accordingly, the Louisiana indictment sets forth a separate and independent violation from the Mississippi indictment. We therefore uphold the ruling of the trial court.

Double Time

Farmigoni further contends that the Mississippi district court erred in making his sentence run consecutive to the Louisiana sentence. Relying on this Court's en banc opinion in United States v. Hernandez, 591 F.2d 1019 (5th Cir. 1979), Farmigoni argues that defendants cannot be sentenced consecutively for two indictment counts alleging violations defined by the same statute and arising from the same transaction.

In Hernandez, the defendant was convicted of both possession with intent to distribute and distribution of heroin in violation of 21 U.S.C. § 841(a)(1). We concluded that consecutive sentencing was

improper where the evidence showed each conviction was a single transaction which merged into one completed offense. Id. at 1022. The instant case, however, is dissimilar. As set forth above, Farmigoni has not been charged with an attempt to execute and execution of a scheme to defraud a single financial institution. Rather, he committed two separate violations of a single statute, involving distinct acts and independent intent to defraud two discrete financial institutions. Farmigoni's argument rests entirely on his rejected double jeopardy claim. The trial court did not abuse its discretion in imposing a consecutive sentence.

Two Banks Too Many

We therefore hold that the Mississippi district court properly dismissed Farmigoni's motion to dismiss on the ground of double jeopardy and correctly convicted and sentenced Farmigoni for defrauding Trustmark.

AFFIRMED.

(2)

No. 91-659

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT FARMIGONI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Double Jeopardy Clause bars petitioner's conviction for defrauding a Mississippi bank by using a fraudulently issued letter of credit in an attempt to obtain a loan, where petitioner had previously been convicted of defrauding the Louisiana bank that employed him by issuing the letter of credit, which was drawn on that bank without authorization.

2. Whether the district court erred in directing that petitioner's sentence for the Mississippi offense run consecutively to the sentence he received for the Louisiana offense.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 31-39) is reported at 934 F.2d 63.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1991. The petition for a writ of certiorari was filed on September 8, 1991, and is therefore out of time under Rule 13.4 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After pleading guilty in the United States District Court for the Southern District of Mississippi, petitioner was convicted of bank fraud, in violation of 18 U.S.C. 1344. He was sentenced to three and one-

half years' imprisonment, to be served consecutively to his earlier sentence for bank fraud in the Eastern District of Louisiana. The court of appeals affirmed. Pet. App. 31-39.

1. The evidence showed that, from March 1985 until his resignation on June 6, 1986, petitioner served as a senior vice president and loan officer of First Financial Savings and Loan Association in Lutcher, Louisiana. Throughout that period, petitioner, together with Loretta Lustig, a customer of the bank, engaged in a scheme to defraud First Financial by issuing unauthorized letters of credit in favor of various of Lustig's concerns. Lustig used the documents to obtain funds from other financial institutions and paid petitioner for his complicity. Pet. App. 32.

Shortly before his resignation from First Financial, petitioner signed a fraudulent letter of credit for the benefit of Double Development, Inc., a business owned by Lustig. The letter of credit ostensibly committed First Financial to pay Trustmark National Bank of Jackson, Mississippi, up to $550,000 in the event that Lustig's company defaulted on a loan. Petitioner was not authorized to issue the letter of credit, and First Financial had no knowledge of his actions. Pet. App. 32.

A few days after the letter of credit was prepared, Lustig presented it with a loan application to Trustmark. Relying on the bogus letter, Trustmark loaned Double Development $500,000. Pet. App. 33.

2. On April 19, 1988, prior to the commencement of the instant case, petitioner was charged in the Eastern District of Louisiana with defrauding First Financial. Count 9 of the 11-count indictment alleged that petitioner provided Lustig with the unauthorized letter of credit for the benefit of Double Development.

The Louisiana indictment did not name any financial institution other than First Financial. Petitioner entered a plea of nolo contendere to the Louisiana indictment, and the district court convicted and sentenced him in February 1990. Pet. App. 33.

3. In April 1989, while the Louisiana prosecution was pending, petitioner was indicted in the instant case for defrauding Trustmark. Count 2 of the indictment charged petitioner and Lustig with applying for a loan at Trustmark on behalf of Double Development using the same fraudulently issued letter of credit that was the subject of Count 9 of the Louisiana indictment. Petitioner moved to dismiss the Mississippi indictment on double jeopardy grounds, claiming that the offenses in the Louisiana and Mississippi cases were the same. After the district court rejected that contention, petitioner pleaded guilty to Count 2. Pet. App. 33.

4. Petitioner appealed, reasserting his claim that, under the Double Jeopardy Clause, his conviction on Count 9 of the Louisiana indictment barred his prosecution on Count 2 of the Mississippi indictment. The court of appeals rejected that contention. Citing *Blockburger* v. *United States*, 284 U.S. 299 (1932), and *Grady* v. *Corbin*, 495 U.S. 508 (1990), the court acknowledged that successive prosecutions may be foreclosed for "different offenses from different statutes arising out of the same acts or occurrence." Pet. App. 36. The court observed, however, that this case does not present that situation; rather, petitioner "violated the same statute on two separate occasions, in two different ways, involving two different victims." *Ibid.* The court explained that the Mississippi indictment charged the fraudulent presentation of the letter of credit to Trustmark as collateral for the $500,000 loan, whereas the Louisiana

indictment charged the fraudulent issuance of the letter of credit by petitioner as part of a scheme to defraud First Financial. *Id.* at 36-37. The court concluded that "[a]lthough both indictments arose out of the same initial scheme, neither requires proof of intent to defraud the other unnamed financial institution." *Id.* at 37. Accordingly, the court held that the two indictments "set[] forth * * * separate and independent violation[s]." *Id.* at 38.

Petitioner also contended on appeal that the district court erred in directing that his sentence run consecutively to the Louisiana sentence, arguing that cumulative sentencing is improper for violations of the same statute arising from the same fraudulent scheme. The court of appeals upheld the sentence, reiterating that petitioner "committed two separate violations of a single statute, involving distinct acts and independent intent to defraud two discrete financial institutions." Pet. App. 39.

ARGUMENT

1. Petitioner renews his contention (Pet. 8-11) that he was prosecuted twice for the same offense in violation of the Double Jeopardy Clause.[1] According

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[1] In light of its decision on the merits, the court of appeals did not address the issue, not raised by the parties in the court of appeals, whether petitioner's guilty plea waived his double jeopardy claim. See Pet. App. 35 n.3. This Court has held that "a plea of guilty to a charge does not waive a claim that—*judged on its face*—the charge is one that the State may not constitutionally prosecute." *United States* v. *Broce*, 488 U.S. 563, 575 (1989), quoting *Menna* v. *New York*, 423 U.S. 61, 63 n.2 (1975). Here, we understand petitioner to argue that the instant prosecution is facially duplicative of the earlier one, and he does not seek to adduce additional

to petitioner, both indictments charged his attempt to defraud First Financial--the Louisiana bank that employed him—as a violation of the mail fraud statute, and prosecution twice for that offense under the same statute would violate the Double Jeopardy Clause.

a. Petitioner is incorrect in asserting that both indictments charged that he attempted to defraud First Financial. The court of appeals explained that "a single transaction, especially if, as here[,] of any extended sort, can produce numerous infractions." Pet. App. 36. After analyzing the two indictments, the court of appeals agreed with the district court that "[a]lthough both indictments arose out of the same initial scheme, neither requires proof of intent to defraud the other unnamed financial institution." *Id.* at 37. That conclusion concerning the meaning of the two indictments brought against petitioner, concurred in by both lower courts, was correct and would not in any event warrant further review. In light of that conclusion, the court of appeals correctly determined that petitioner violated the bank fraud statute twice.[2]

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evidence to support his claim. In these circumstances, we do not contend that petitioner's guilty plea constituted a waiver.

[2] Petitioner does not challenge the court of appeals' conclusion, as a matter of statutory construction, that the unit of prosecution under the bank fraud statute, at least in circumstances similar to those presented here, turns on the number of victims, not the number of financial instruments involved. In any event, the court of appeals' decision that the two attempts to defraud the two banks in two different ways—attempts that were completed at two different times—constituted two violations of the statute was plainly correct and not in conflict with any decision of any other court.

b. Petitioner's second prosecution did not violate the Double Jeopardy Clause. The Double Jeopardy Clause does not control Congress's power to define the unit of prosecution under a criminal statute. If a defendant is prosecuted twice for violation of the same statute in circumstances under which Congress intended only a single unit of prosecution, the second conviction must be reversed as a matter of substantive criminal law, because Congress intended the defendant's conduct to result in only one violation of the statute. If, on the other hand, a defendant is prosecuted twice for violation of the same statute in circumstances under which Congress intended there to be two units of prosecution, then the second conviction is valid under the statute and raises no issue under the Double Jeopardy Clause.

This Court has long held that congressional intent is determinative as to the definition of the unit of prosecution under a federal criminal statute. As the Court explained in *Sanabria* v. *United States*, 437 U.S. 54, 69-70 (1978):

> It is Congress, and not the prosecution, which establishes and defines offenses. Few, if any, limitations are imposed by the Double Jeopardy Clause on the legislative power to define offenses. But once Congress has defined a statutory offense by its prescription of the "allowable unit of prosecution," that prescription determines the scope of protection afforded by a prior conviction or acquittal. Whether a particular course of conduct involves one or more distinct "offenses" under the statute depends on this congressional choice.

See *id.* at 70 n.24 (analysis under the *Blockburger* double jeopardy test is appropriate where "a *single* transaction may give rise to separate prosecutions

* * * *under separate statutes*") (emphasis added); see also *Ladner* v. *United States*, 358 U.S. 169, 173 (1958) ("[t]here is no constitutional issue presented" in a case involving the appropriate unit of prosecution under a federal criminal statute); *Bell* v. *United States*, 349 U.S. 81, 82 (1955) ("The punishment appropriate for the diverse federal offenses is a matter for the discretion of Congress, subject only to constitutional limitations, more particularly the Eighth Amendment."); *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221 (1952); *In re Snow*, 120 U.S. 274, 283-286 (1887). See also *Whalen* v. *United States*, 445 U.S. 684, 703-704 (1980) (Rehnquist, J., dissenting) (discussing rule that "the proper unit of prosecution [is] completely dependent upon the legislature's intent").

Nothing in *Grady* v. *Corbin*, on which respondent relies, altered the well-settled principle that definition of the unit of prosecution under a federal criminal statute is a matter of congressional intent. Like its predecessors, *Harris* v. *Oklahoma*, 433 U.S. 682 (1977), and *Illinois* v. *Vitale*, 447 U.S. 410 (1980), *Grady* involved the question whether violations of *different* statutes arising from a single act or transaction are the "same offense" under the Double Jeopardy Clause, and hence may not be prosecuted separately. Cf. *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932) (stating test for when "the same act or transaction constitutes a violation of two distinct statutory provisions"). The question presented by this case, by contrast, is whether respondent's use of the same instrument to defraud two different banks at two different times constitutes a single violation or two separate violations of a single statute. Accordingly, *Grady* v. *Corbin* has no bearing on the analysis of this case, which turns entirely on the

question of the congressional intent underlying the bank fraud statute.[3]

2. Petitioner further contends (Pet. 12-13) that the district court violated the Double Jeopardy Clause in directing that the sentence imposed in this case run consecutively to the sentence imposed for his earlier bank fraud conviction. He argues that that is so because the two offenses are the same. To be sure, absent clear congressional intent to the contrary, a court may not impose cumulative punishment where multiple offenses arising out of a single act or transaction are the same. See, *e.g.*, *Missouri* v. *Hunter*, 459 U.S. 359, 365-366 (1983). But, as we have shown, petitioner's bank fraud offenses arose out of distinct criminal acts committed on different days against different banks. Nothing in the Double Jeopardy Clause precludes consecutive sentences for separate violations of the same statutory provision, and petitioner cites no authority to the contrary.

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[3] This case need not be held for this Court's decision in *United States* v. *Felix*, No. 90-1599. *Felix* presents two issues concerning the interpretation of the Double Jeopardy Clause, in light of this Court's decision in *Grady*: whether a person may be prosecuted for a drug conspiracy after previously having been prosecuted for a substantive drug offense based on the same conduct that is alleged in some of the overt acts of the conspiracy charge; and whether prosecution for substantive drug offenses is barred because the defendant was previously prosecuted for drug offenses arising out of altogether different conduct, where evidence of the later-prosecuted offense had been introduced in the earlier prosecution to prove intent. *Felix*, like *Grady*, raises no "unit of prosecution" issue, much less any question having to do with the interpretation of the bank fraud statute. Accordingly, this Court's disposition of *Felix* would be unlikely to have any bearing on this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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